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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 33

ARTHUR C. BROWN

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED MARCH 10, 1928

(31,782)

(31,782)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 319

ARTHUR C. BROWN

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 15, 1926

5515/6

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Monday, March 8, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Hon. Albert B. Anderson, Circuit Judge; Edward M. Holloway, Clerk; Palmer E. Anderson, Marshal.

Before Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Hon. Albert B. Anderson, Circuit Judge

3632

ARTHUR C. BROWN

vs.

UNITED STATES OF AMERICA

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division

ORDER TO TRANSMIT QUESTIONS OF LAW

It is ordered by the court that the clerk of this court be, and is hereby directed to transmit to the Supreme Court of the United States certain questions of law, which are in the following words and figures, to wit:

STATEMENT OF FACTS

On this writ of error certain questions of law have arisen concerning which this court is in doubt and desires the advice of the Supreme Court.

The relevant facts out of which the legal questions grow are:

On July 13, 1925, the United States District Court for the Northern District of Illinois issued a subpœna duces tecum without ad testificandum clause directed to the National Al-

liance of Furniture Manufacturers, commanding it to appear and produce certain letters, telegrams, papers and books therein specified in its possession and belonging to it.

The subpœna was served on one Arthur C. Brown, its secretary, who appeared before the grand jury in response thereto and refused to say anything concerning the matters mentioned in said subpœna unless he should be first subpœnaed and sworn. When this privilege was refused, he produced and read to the grand jurors a writing of the tenor following:

"GENTLEMEN OF THE GRAND JURY:

There has been served upon me a subpœna dated July 13, 1925, ordering National Alliance of Furniture Manu- [fol. 2] facturers to appear on July 17, 1925, before your honorable body in Chicago.

There is no such person or entity as National Alliance of Furniture Manufacturers which is capable of being served with a subpœna or of appearing here in answer to one. I have appeared here today, in deference to your official position, to inform you of that fact."

He was then advised by counsel for the government:

"The requirements of the subpœna were not with reference to the private or personal affairs of him the said Arthur C. Brown, and that said requirements concerned him the said Arthur C. Brown only as he was connected with the affairs of said National Alliance of Furniture Manufacturers."

Brown refused to comply with the said subpœna, and the grand jury presented him to the court as a contumacious witness. In court Brown stated that the National Alliance of Furniture Manufacturers is a name assumed by a voluntary organization of furniture manufacturers; that said organization is not a corporation; that to compel him to produce the documents in response to said subpœna would be to compel him to produce evidence against himself in violation of the Fourth Amendment to the Constitution and destroy his constitutional rights. Brown had previously been indicted as one of several defendants charged with a violation of the Sherman Anti Trust law.

The court ordered Brown to appear before the grand jury with the documents of the National Alliance of Furniture Manufacturers described in the subpœna. He refused a second time and the grand jury again presented him to the court as a contumacious witness. Whereupon he was punished as and for criminal contempt.

From a judgment pronounced upon him, he prosecuted this writ of error.

The questions concerning which this court desires advice are herewith presented:

QUESTIONS CERTIFIED

Question 1. Can the court compel through a subpœna duces tecum the production of the books and papers of a voluntary unincorporated association, over its protest?

Question 2. Would the answer to Question No. 1 be affected if it appear that the members of such voluntary unincorporated association were all corporations?

Question 3. Would the fact that the secretary of such voluntary unincorporated association is also a member of such association, entitle him to claim the protection of the Fourth or Fifth Amendment to the Constitution, notwithstanding the subpœna called for the papers that belonged to and were in the possession of the said voluntary unincorporated association?

The clerk of this court is directed to transmit a certified copy hereof to the Supreme Court.

March 8, 1926.

Evan A. Evans, George T. Page, Albert B. Anderson.

[fol. 31] Clerk's certificate to foregoing omitted in printing.

Endorsed on cover: File No. 31,782. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 319. Arthur C. Brown vs. The United States of America. (Certificate.) Filed March 20th, 1926. File No. 31,782.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 33

ARTHUR C. BROWN

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED OCTOBER 22, 1927

(31,782)

(31,782)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 33

ARTHUR C. BROWN

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1927

ls. a & b]

SUPREME COURT OF THE UNITED STATES

DER TO SEND UP ENTIRE RECORD AND CAUSE—October 24, 1927

t is ordered that, in accordance with section 239 of the dicial Code, as amended by the act of February 13, 1925 229, 43 Stat. 936), the entire record in this cause be cer- d up to the Court so that the whole matter in con- versy may be considered by the Court, and this cause is eby set down for hearing on the first Tuesday of Janu- next.

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l. 1] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

re ARTHUR C. BROWN, a Witness Before the Grand Jury

Presentment of Grand Jury—Filed July 17, 1925

The grand jurors for the United States, empaneled and rn in said court at said term, upon their oath present, t a subpœna duces tecum of the tenor following, to wit:

SUBPŒNA DUCES TECUM

United States Subpœna Duces Tecum

No. 1727, July Term, 1925

The United States Grand Jury

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

President of the United States of America to National lliance of Furniture Manufacturers, Grand Rapids Sav- gs Bank Building, Grand Rapids, Michigan:

ou are hereby commanded that laying aside all and gular your business and excuses, you be and appear be- the Grand Jury of the District Court of The United

States for the Northern District of Illinois, in the Federal Building, in the City of Chicago in said District on the 17th day of July, A. D. 1925, at 10 o'clock A. M. of said day, and also that you bring with you and produce at the time and place aforesaid

All letters or copies of letters, telegrams or copies of telegrams, incoming and outgoing, passing between the National Alliance of Furniture Manufacturers and its pre- [fol. 2] decessor, the National Alliance of Case Goods Associations, their officers and agents, and the several members of said National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations (including corporations, partnerships, and individuals, and their respective officers and agents) during the period from January 1, 1922, to June 15, 1925, relating to the manufacture and sale of case goods, and particularly with reference to—

(a) general meetings of Alliance
(b) zone meetings of Alliance members
(c) costs of manufacture
(d) grading of various types of case goods
(e) issuing new price lists
(f) discounts allowed on price lists
(g) exchanging price lists
(h) maintaining prices
(i) advancing prices
(j) reducing prices
(k) rumors of charges of price cutting
(l) discounts, terms and conditions of sale, etc.,
(m) curtailment of production,
(n) The pricing of certain articles or suits of furniture by W. H. Coye
(o) Cost bulletins
(p) Intention of W. H. Coye and A. C. Brown to attend furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y., and meetings of members held prior to and during said furniture markets or expositions.
(q) Conditions obtaining at various furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y.

(r) Manufacturers maintaining a fair margin of profit between cost prices and selling prices.

on behalf of the United States, and not depart the court without leave thereof or of the District Attorney.

Hereof fail not under penalty of what may befall you thereon.

To the Marshal of the Western District of Michigan to execute and return in due form of law.

Witness, the Honorable George A. Carpenter and the Honorable James H. Wilkerson and the Honorable Adam C. Cliffe, District Judges of the United States, this 13th [fol. 3] day of July, A. D. 1925, and in the 150th year of the Independence of the United States of America.

Charles M. Bates, Clerk. (Seal.)

was duly served upon said National Alliance of Furniture Manufacturers, a voluntary organization of furniture manufacturers selling and shipping their products in interstate commerce, by service of the same upon said Arthur C. Brown, at Grand Rapids, Michigan, by the United States Marshal for the Western District of Michigan, to whom the same was directed for service, said Arthur C. Brown being Secretary of said National Alliance of Furniture Manufacturers; that on this 17th day of July, 1925, said Arthur C. Brown appeared in person before said grand jurors at Chicago aforesaid and refused to say anything concerning the matters mentioned in said subpœna unless he should first be "subpœnaed and sworn", at the same time producing and reading to the grand jurors a writing of the tenor following, to wit:

STATEMENT OF ARTHUR C. BROWN

GENTLEMEN OF THE GRAND JURY: There has been served upon me a subpœna dated July 13, 1925, ordering National Alliance of Furniture Manufacturers to appear on July 17, 1925, before your honorable body in Chicago.

There is no such person or entity as National Alliance of Furniture Manufacturers which is capable of being served with a subpœna or of appearing here in answer to one. I have appeared here today, in deference to your official position, to inform you of that fact.

and refused to say, when asked, whether his refusal to comply with said subpœna was because so to do would incriminate him in connection with his private and personal affairs or not; whereupon counsel for the Government stated to said Arthur C. Brown that the requirements of the subpœna were not with reference to the private or personal affairs of him the said Arthur C. Brown and that said requirements concerned him the said Arthur C. Brown only as he was connected with the affairs of said National Alliance of Furniture Manufacturers; but said Arthur C. Brown still refused to comply with said subpœna without being personally subpœnaed and sworn before said grand jury, and refused to say whether or not he had complied with said subpœna so far as to bring the documents mentioned therein with him to Chicago.

[fol. 4] REQUEST THAT ARTHUR C. BROWN BE COMPELLED TO COMPLY WITH REQUIREMENTS OF SUBPŒNA

Wherefore said grand jurors, because, as they say, the evidence called for in said subpœna is important and material to an inquiry now being conducted by them concerning violations of the anti-trust laws of the United States by said furniture manufacturers, present said Arthur C. Brown to this honorable court as a contumacious witness, and respectfully request that the steps be taken to compel him forthwith to comply with the requirements of said subpœna.

F. M. Bowes, Foreman.

Chicago, Ill., July 17, 1925.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed July 18, 1925

Arthur C. Brown, for answer to so much of the petition of the grand jury as he is advised it is necessary for him

to answer, denies that he is or was a witness before the grand jury for the present term.

Said Arthur C. Brown admits that on, to-wit July 14, 1925, the subpena duces tecum alleged in said petition was handed to him by the United States Marshal or a Deputy Marshal for the Western District of Michigan; that he, the said Brown, then examined said document and noticed that it commanded the National Alliance of Furniture Manufacturers to be and appear before the grand jury, as is set forth in said subpena; that he, the said Brown, thereupon came from Grand Rapids, Michigan, to Chicago, Illinois, and on July 17, 1925, appeared in person before the grand [fol. 5] jury; that he, the said Brown, thereupon made to the grand jury the statement alleged in the petition, to the effect that there is no such person or entity as Nation Alliance of Furniture Manufacturers which is capable of being served with a subpena or of appearing in answer to one; that thereupon special assistant to the attorney general Pagan, present before the grand jury, asked him, the said Brown, a number of questions, all and each of which he, the said Brown, declined to answer as he had not been subpenaed to appear and testify before the grand jury.

Said Arthur C. Brown further states that National Alliance of Furniture Manufacturers is the name assumed by a voluntary oragnization of furniture manufacturers and that said organization is not a corporation either de jure or de facto.

Said Arthur C. Brown further states that he is informed and believes and upon such information and belief states that the matter now under investigation by the grand jury is exactly the same matter as was investigated by a previous grand jury, which returned to this Court, on May 29, 1925, indictment No. 13663, in which he, the said Brown, was and is named as a defendant and that he, the said Brown, was indicted "not with reference to the private or personal affairs of him the said Arthur C. Brown," but "only as he was connected with the affairs of "said voluntary organization.

Said Arthur C. Brown further states that on, to wit, June 19, 1925, he, the said Brown, was duly served with a subpena duces tecum directed to him, the said Brown, commanding him to be and appear before the grand jury at Chicago aforesaid on July 7, 1925, and to have with him certain

documents which said subpœna described in the identical words and figures as the subpœna set forth in said petition; that, in answer to said subpœna, he, the said Brown, did appear at the said time and place and that he did take into the room occupied by the grand jury, and before the grand jury, the documents so requested, but that thereupon special assistant to the attorney general Shale asked him, the said Brown, certain questions which he declined to answer unless sworn as a witness; that thereupon he, the said Brown, was excused from further attendance by said Shale.

Said Arthur C. Brown further states that, said organization being a voluntary one and not a corporation, to compel him, the said Brown, being now under indictment as aforesaid and the subject of a grand jury investigation, to produce documents in his possession in response to the [fol. 6] subpœna set forth in said petition would be to disregard his constitutional rights, privileges and immunities, to compel him to produce evidence against himself, in violation of Amendment V to the Constitution and to submit to an unlawful search and seizure in violation of Amendment IV to the Constitution in that said subpœna fails to show that the documents described therein are important or material, that said subpœna is a blanket command to produce all letters or copies of letters and telegrams sent to or received from a large number, to wit, 192 persons during a period of three years, five and one half months, and calls for many documents which are obviously harmless and of no evidentiary value and that said subpœna is not a bona fide attempt to obtain evidence to which the United States or the grand jury is entitled but is and constitutes a fishing expedition, undertaken without knowledge of whether or not he, the said Brown, has in his possession evidence desired by the United States or the grand jury, but undertaken in the hope that evidence may be discovered which can be used against him, the said Brown on his trial under the said indictment or under a new indictment.

Said Arthur C. Brown further states that his actions, now by the grand jury complained of, did not result from any contempt by him had of this honorable court or of the grand jury.

Arthur C. Brown.

Duly sworn to by Arthur C. Brown. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 7] In United States District Court

[Title omitted]

Order that Arthur C. Brown Appear Before Grand Jury—July 18, 1925

The matter of the presentment of the grand jury, dated July 17, 1925, in the above entitled cause having on this 18th day of July, 1925, been considered by the court, said Arthur C. Brown being present in court in person and represented by his counsel, Weymouth Kirkland, Esq., the court finds that said Arthur C. Brown presents no sufficient excuse in law for his refusal and failure to produce before the grand jury of this court the documentary evidence called for in said subpœna duces tecum, and therefore orders and directs said Arthur C. Brown forthwith to appear before said grand jury in obedience to said subpœna and there produce the evidence called for in said subpœna and mentioned in said presentment, whether or not said grand jury sees fit to administer an oath to said Arthur C. Brown in that behalf.

Adam C. Cliffe, District Judge.

[fol. 8] In United States District Court

[Title omitted]

Presentment of Grand Jury—Filed July 18, 1925

The grand jurors for the United States, empaneled and sworn in said court at said term, upon their oath further present, that said Arthur C. Brown came again in person before said grand jurors on this 18th day of July, 1925, in obedience to the order of said court of July 18, 1925, and,

being again asked to produce before said grand jurors the documentary evidence called for in the subpœna duces tecum set forth in full in the former presentment of him to this court, dated July 17, 1925, as a contumacious witness in that on that day he appeared before said grand jurors and failed and refused to comply with the requirements of said subpœna, said Arthur C. Brown, in the same manner and on the same conditions as to being "subpœnaed and sworn," as on said July 17, 1925, he did, again refused and failed to produce said evidence before said grand jurors in obedience to said subpœna.

Wherefore, said grand jurors, because, as they again say, said evidence called for in said subpœna is important and material to said inquiry now being conducted by them concerning violations of the anti-trust laws of the United States by the furniture manufacturers in said presentment of July 17, 1925, mentioned, again present said Arthur C. Brown to this honorable court as a contumacious witness, and respectfully request that he be proceeded against in the name of the United States as for criminal contempt for his last mentioned refusal and failure to comply with the requirements of said subpœna.

F. M. Bowes, Foreman.

[File endorsement omitted.]

[fol. 9] In United States District Court

United States

vs.

Arthur C. Brown

Criminal Contempt

Judgment—July 18, 1925

It appearing to the court that the above named Arthur C. Brown appeared in person before the grand jury of this court, empaneled and sworn at this term, to wit, on July 17, 1925, in obedience to a subpœna duces tecum requiring him to produce before said grand jury certain documentary evi-

dence in said subpœna mentioned, and there refused and failed to comply with the requirements of said subpœna; that said Arthur C. Brown on this July 18, 1925, was presented by the grand jury to the court for his refusal and failure aforesaid; that after a hearing in said matter before the court an order was entered directing said Arthur C. Brown to appear again before said grand jury and there comply with the requirements of said subpœna; that thereupon said Arthur C. Brown again appeared before said grand jury and again refused and failed to comply with the requirements of said subpœna by producing said evidence before said grand jury; that thereupon said grand jury again presented to the court the matter of such refusal and failure; and that said Arthur C. Brown, being now present in court in person and by his attorneys Weymouth Kirkland and Robert Golding, and having again refused to comply with the requirements of said subpœna, it is therefore [fol. 10] ordered and adjudged by the court that said Arthur C. Brown stands in contempt of the court for his said refusal and failure, and that, for such contempt, he be imprisoned in the common jail of Cook County, in this district for and during the period of thirty days, or until he complies with the requirements of said subpœna; whereupon an exception was noted by his said attorneys to the action of the court in so finding said Arthur C. Brown guilty of contempt and sentencing him as aforesaid, and is allowed.

And, upon motion of said Arthur C. Brown, by his said attorneys, it is further ordered that the execution of said order and judgment be stayed until July 25, 1925.

Adam C. Cliffe, District Judge.

In United States District Court

[Title omitted]

Petition for Writ of Error—Filed July 25, 1925

Now comes Arthur C. Brown, petitioner, and respectfully shows that on a presentment filed in said district court by the grand jury, said district court did, on July 18, 1925, order petitioner to appear and to produce before said grand

jury certain documentary evidence called for in a subpœna duces tecum, as set forth in said presentment, and that thereafter, on July 18, 1925, upon a second presentment by said grand jury, said district court did adjudge petitioner to be in contempt and did sentence petitioner to be imprisoned in the common jail of Cook County for and during a period of thirty days or until he, the peti- [fol. 11] tioner, complies with the requirements of said subpœna.

And your petitioner respectfully shows that in said judgments and the proceedings had prior thereto in the above entitled cause, certain errors were committed to the prejudice of your petitioner, all of which will appear more in detail by the assignment of errors which is filed in this court by your petitioner, together with this petition.

Wherefore your petitioner, the said Arthur C. Brown, prays that a writ of error may issue in his behalf to said district court out of the United States Circuit Court of Appeals for the Seventh Circuit, for the correction of the errors so complained of; and that said writ of error may be made a supersedeas as to your petitioner, and that your petitioner may be admitted to bail pending the determination of said writ of error; and that the further proceedings in said district court may be superseded and stayed and that all further necessary orders or processes may be made or stayed, to the end that the errors complained of may be corrected by the said United States Circuit Court of Appeals for the Seventh Circuit, and that said judgments and sentences may be set aside and held for naught.

Your petitioner further prays that a citation in due form of law may issue requiring the United States of America, the defendant in said writ of error, to appear in said United States Circuit Court of Appeals for the Seventh Circuit and then and there to make answer to the said assignment of errors made by your petitioner upon the record in the proceedings in said cause; and your petitioner herewith presents his assignment of errors, in accordance with the rules of the said United States Circuit Court of Appeals for the Seventh Circuit and the course and practice in said district court.

And your petitioner, said Arthur C. Brown, prays that an order may be entered in his behalf directing the clerk of said

district court to make return of said writ of error respectfully prayed for by your petitioner by transmitting to the said United States Circuit Court of Appeals for the Seventh Circuit a single true copy of the record in the above entitled cause, said assignment of errors, this petition for writ of error, and the other proceedings had in said district court in the above entitled cause necessary to the hearing of said [fol. 12] writ of error in said United States Circuit Court of Appeals for the Seventh Circuit.

Arthur C. Brown, Petitioner. Weymouth Kirkland, Robert N. Golding, Attorneys for Petitioner.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Assignment of Errors—Filed July 25, 1925

Now comes Arthur C. Brown, defendant in the above entitled cause, and in connection with his petition for a writ of error herein says that in the record and proceedings prior to and during the hearing of the above entitled cause in the said district court, error has intervened to his prejudice and he makes the following assignment of errors, which he, the said Arthur C. Brown, avers occurred on the trial of said cause, to wit:

1. Said district court erred in receiving the presentment of the grand jury filed July 17, 1925;

2. Said district court erred in finding on the presentment of the grand jury filed July 17, 1925, and on the answer of the said Arthur C. Brown thereto, that said Arthur C. Brown in said answer presented no sufficient excuse in law for his refusal and failure to produce before the grand jury [fols. 13 & 14] the documentary evidence called for in the subpœna duces tecum described in said presentment.

3. Said district court erred in entering its order of July 18, 1925, ordering and directing said Arthur C. Brown to

appear before said grand jury in obedience to said subpœna and there to produce the evidence called for in said subpœna.

4. Said district court erred in receiving the presentment of the grand jury filed July 18, 1925.

5. Said district court erred in finding on said presentment so filed on July 18, 1925, that Arthur C. Brown, by his refusal to produce said evidence before said grand jury, stood in contempt of said court.

6. Said district court erred in entering its order of July 18, 1925, whereby it adjudged said Arthur C. Brown to be in contempt of said court, and whereby it directed him to be imprisoned in the common jail of Cook County for and during the period of thirty days, or until he, the said Brown, should comply with the requirements of said subpœna.

Wherefore, the said Arthur C. Brown, by reason of the errors aforesaid, prays that the said judgments and sentences against and upon him, the said Arthur C. Brown, may be reversed and held for naught.

Arthur C. Brown, petitioner. Weymouth Kirkland, Robert N. Golding, Attorneys for Petitioner.

[File endorsement omitted.]

Bond on writ of error for $5,000, approved and filed July 25, 1925, omitted in printing.

[fol. 15] In United States District Court

[Title omitted]

Order Allowing Writ of Error—July 25, 1925

Now on this 25th day of July A. D. 1925, come the parties by their attorneys, and Arthur C. Brown, defendant and petitioner, in person, and on motion of said Arthur C. Brown, by his attorneys, and upon filing his petition for a writ of error and his assignment of errors.

It is Ordered by the court that a writ of error be and hereby is allowed to said Arthur C. Brown to have reviewed in the United States Circuit Court of Appeals for the Seventh Circuit the judgments of this court entered on July 18, A. D. 1925.

It is Further Ordered by the court that the amount of the bond on said writ of error be and it hereby is fixed at the sum of Five Thousand Dollars, same to act as a supersedeas.

Adam C. Cliffe, District Judge.

[fol. 16] In United States District Court

Writ of Error—Filed July 25, 1925

United States of America, ss:

The President of the United States, to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said district court before you, or some of you, between the United States of America, plaintiff, and Arthur C. Brown, defendant, a manifest error hath happened, to the great damage of the said Arthur C. Brown, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit within thirty (30) days from the date hereof, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to

correct that error what of right, and according to the laws and customs should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States Supreme Court, this 25th day of July, in the year of our Lord one thousand nine hundred and twenty-five.

Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Allowed by: Adam C. Cliffe, District Judge.

[File endorsement omitted.]

[fol. 17] In United States District Court

[Title omitted]

Præcipe for Transcript of Record

To Charles M. Bates, Esq., Clerk of said court:

You will please prepare a true and correct transcript of the complete record in the above entitled cause to be filed with the clerk of the United States Circuit Court of Appeals for the Seventh Circuit, in obedience to the writ of error issued out of said district court on behalf of said Arthur C. Brown, to wit:

1. The presentment of the grand jury filed July 17, 1925;
2. The answer of said Arthur C. Brown thereto filed July 18, 1925;
3. The order of said district court of July 18, 1925, ordering said Arthur C. Brown to appear before the grand jury and there to produce documents in obedience to a subpœna;
4. The presentment of the grand jury filed July 18, 1925;
5. The order of the district court of July 18, 1925, adjudging said Arthur C. Brown to be in contempt and ordering him to be imprisoned for thirty days or until he complies with the requirements of said subpœna.
6. The assignment of errors filed by said Arthur C. Brown;

7. The petition for writ of error filed by said Arthur C. Brown;

8. The original writ of error with return thereof;

9. Order of July 25, 1925, allowing said writ of error;

10. Supersedeas bond filed by defendant July 25, 1925;

11. The original citation;

12. This præcipe;

13. Certificate of clerk authenticating transcript of record;

14. Certificate of clerk of transmission of record to the [fol. 18] United States Circuit Court of Appeals for the Seventh Circuit pursuant to the order allowing said writ of error.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 19] Citation, in usual form, showing service on Roger Shale, filed July 29, 1925, omitted in printing.

[fols. 20 & 21] Clerk's certificate to foregoing transcript omitted in printing.

Certificate to U. S. Supreme Court omitted in printing as it is printed under separate cover.

FILED
APR 6 1927
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

NO. [redacted] 33

ARTHUR C. BROWN

vs.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT ON BEHALF OF ARTHUR C. BROWN.

WEYMOUTH KIRKLAND,
ROBERT N. GOLDING,
Counsel for Arthur C. Brown.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1926.

ARTHUR C. BROWN

vs.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE.

This case is here on certificate from the circuit court of appeals for the seventh circuit, which certified the following questions (rec. 3):

Question 1. Can the court compel through a subpoena duces tecum the production of the books and papers of a voluntary unincorporated association, over its protest?

Question 2. Would the answer to question no. 1 be affected if it appear that the members of such voluntary unincorporated association were all corporations?

Question 3. Would the fact that the secretary of such voluntary unincorporated association is also a member of such association, entitle him to claim the protection of the fourth or fifth amendment to the constitution, notwithstanding the subpoena called for the papers that belonged to and were in the possession of the said voluntary unincorporated association?

The facts are as follows:—

On July 13, 1925, the district court issued a subpoena duces tecum, directed, not to Arthur C. Brown, but to "National Alliance of Furniture Manufacturers," commanding the association to appear before the grand jury, at Chicago, on July 17, 1925, there to produce certain papers described in said subpoena. (Rec. 1, 2.)

The marshal served this subpoena on Brown, who was the secretary of the association. (Rec. 2.)

Brown thereupon, at the time stated, appeared before the grand jury at Chicago and made the following statement:

> "Gentlemen of the Grand Jury:
>
> There has been served upon me a subpoena dated July 13, 1925, ordering National Alliance of Furniture Manufacturers to appear on July 17, 1925, before your honorable body in Chicago.
>
> There is no such person or entity as National Alliance of Furniture Manufacturers which is capable of being served with a subpoena or of appearing here in answer to one. I have appeared here today, in deference to your official position, to inform you of that fact." (Rec. 2)

This association was a typical trade association, being a purely voluntary organization, and was not a corporation, either *de jure* or *de facto*. (Rec. 2.)

After making the above statement to the grand jury, Brown was asked questions by government counsel, then present, and was informed by them that

> "the requirements of the subpoena were not with reference to the private or personal affairs of him the said Arthur C. Brown, and that said requirements concerned him the said Arthur C. Brown only as he was connected with the affairs of said National Alliance of Furniture Manufacturers." (Rec. 2.)

Inasmuch, however, as Brown had already been indicted
a previous grand jury because of his connection with said
sociation, he stood upon his constitutional rights and de-
ned to answer any questions until and unless he personally
ould be subpoenaed and sworn as a witness. (Rec. 2.)

The grand jury thereupon, on July 17, 1925, presented
own to the court as "a contumacious witness." (Rec. 3.)

Finally, the court, upon a second presentment by the grand
y, adjudged Brown guilty of criminal contempt. (Rec. 3.)

BRIEF OF ARGUMENT.

PART I.

QUESTION 1.

I. The National Association of Furniture Manufacturers, being an unincorporated, voluntary organization, and not a corporation, was unable, physically, to be served with the subpoena, to appear in answer thereto, or to produce documents as required thereby.

A. An unincorporated association, while not a technical partnership, possesses many of the characteristics of a partnership. A point of distinction is, that associations, as a general rule, are not organized for profit.

Goesele v. *Bimeler*, 14 How. 589;

Thomas v. *Ohio State University Trustees*, 195 U. S. 207;

Houghton v. *Grimes* (Vt., Nov. 4, 1926), 135 Atl. 15;

Martin v. *Hemphill* (Com. of App., Tex., Sec. B, Feb. 15, 1922), 237 S. W. 550, 553;

O'Neil v. *Co-Operative League of America*, 278 Fed. 737;

Robbins Co. v. *Cook*, 42 S. D. 136, 173 N. W. 445;

Korstad v. *Williams*, 80 Wash. 452, 141 Pac. 881;

Campbell v. *Floyd*, 153 Pa. St. 84, 25 Atl. 1033.

B. The outstanding difference between an unincorporated association and a corporation is that the former, like a partnership, is not a separate entity and possesses no individuality.

1. It cannot, as such, own property.

Baptist Association v. *Hart's Executors*, 4 Wheat. 1;
Owens v. *The Missionary Society*, 14 N. Y. 380;
Downing v. *Marshall*, 23 N. Y. 366;
Ostrom v. *Greene*, 161 N. Y. 353, 55 N. E. 919;
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Normandy Consol. School Dist. v. *Harral* (Mo., Div. 1, July 30, 1926), 286 S. W. 86;
Claggett v. *Kilbourne*, 66 U. S. 346, 348;
Simson v. *Klipstein*, 262 Fed. 823;
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Liquid Carbonic Co. v. *Sullivan*, 103 Okl. 78, 229 Pac. 561;
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Butterfield v. *Beardsley*, 28 Mich. 412;
Norwood v. *Francis*, 25 App. D. C. 463, 474;
Bradford v. *National Benefit Ass'n.*, 26 App. D. C. 268, 273;
Heinze v. *Industrial Com.*, 288 Ill. 342, 346;
In re Peck, 206 N. Y. 55, 99 N. E. 258, 259;
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Heiligenstein v. *Schlotterbeck*, 300 Ill. 206, 133 N. E. 188.

2. It cannot, as such, enter into contracts.

Lewis v. *Tilton*, 64 Ia. 220, 19 N. W. 911;

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Lawler v. *Murphy*, 58 Conn. 294, 20 Atl. 457;

Grand International Brotherhood of L. E. v. *Green*, 206 Ala. 196, 89 So. 435.

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Nightingale v. *Barney*, 4 Greene (Ia.), 106;

Marshalltown Mut. Plate Glass Ins. Ass'n. v. *Bendlage*, 195 Ia. 1200, 191 N. W. 97;

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Roberts v. *Kennedy*, 13 Del. Ch. 133, 116 Atl. 253.

4. Nor can it, in the absence of statute, generally be sued by such name.

Society of Shakers v. *Watson* (6 C. C. A.), 68 Fed. 730;

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State v. *Kansas City Live Stock Exchange*, 211 Mo. 181, 109 S. W. 675.

C. The law has not been changed by the Hale and Coronado cases. This court has not endowed unincorporated associations with individuality.

1. The reasoning of the *Hale* case does not apply to this case.

Hale v. *Henkel*, 201 U. S. 43;

Wilson v. *U. S.*, 221 U. S. 361;

U. S. v. *Brasley*, 268 Fed. 59;

Karges Furniture Co. v. *Amalgamated W. L. U. No. 131*, 165 Ind. 421, 75 N. E. 877.

2. The *Coronado* case is based upon the familiar theory of presence by representation.

United Mine Workers of America v. *Coronado Coal Co.*, 259 U. S. 344;

Beatty v. *Kurtz*, 2 Pet. 566;

Spaulding v. *Evenson*, 149 Fed. 913, affirmed (9 C. C. A.), 150 Fed. 517;

National Harness Mfgs. Ass'n. v. *Federal Trade Com.* (6 C. C. A.), 268 Fed. 705;

Iron Molders' Union v. *Allis Chalmers Co.* (7 C. C. A.), 166 Fed. 45, 48;

United States and Cuba A. W. E. Corp. v. *Lloyds*, 291 Fed. 889;

Robe v. *Lloyds* (2 C. C. A.), 10 F. (2d) 731.

Part II.

Question 2.

Corporate records may be reached by subpoena, whether the custodian thereof be another corporation, a partnership or an individual.

U. S. v. *Invader Oil Corp.*, 5 F. (2d) 715;

Woodworth v. *Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893;

Martin v. *D. B. Martin Co.*, 10 Del. Ch. 211, 88 Atl. 612.

Part III.

Question 3.

Corporations and individuals may become members of unincorporated associations, in which case, the books and records belong to the individuals as well as to the corporations.

Houston v. *Dexter & Carpenter*, 300 Fed. 354;

Quitman Oil Co. v. *McRee*, 18 Ga. App. 128, 88 S. E. 921;

Salem-Fairfield Tel. Ass'n. v. *McMahan*, 78 Ore. 477, 153 Pac. 788;

Wilson v. *Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249;

14 a C. J. 293;

Amusement Syndicate Co. v. *Martling*, 108 Kan. 798, 196 Pac. 1058;

Moore v. *Hillsdale County Tel. Co.*, 171 Mich. 388, 137 N. W. 241;

Browning v. *Cover*, 108 Pa. St. 595.

A subpoena would compel Brown to produce his own documents, for use against himself in a criminal proceeding, in violation of his constitutional rights.

Ballman v. *Fagin*, 200 U. S. 186;
U. S. v. *Brasley*, 268 Fed. 59;
Internal Revenue Agent v. *Sullivan*, 287 Fed. 138.

ARGUMENT ON BEHALF OF ARTHUR C. BROWN.

PART I.

QUESTION 1.

Can the court compel through a subpoena duces tecum the production of the books and papers of a voluntary unincorporated association, over its protest?

We submit that the answer to the above question, which we suggest is in the negative, is to be found in the determination of the question of whether a trade association is to be governed, with respect to the production of documents, by the rules relative to partnerships, or those relative to corporations.

I. The National Association of Furniture Manufacturers, being an unincorporated, voluntary organization, and not a corporation, was unable, physically, to be served with the subpoena, to appear in answer thereto, or to produce documents as required thereby.

A. An unincorporated association, while not a technical partnership, possesses many of the characteristics of a partnership. A point of distinction is, that associations, as a general rule, are not organized for profit.

Cases involving associations, of one sort or another, have brought to the courts for decision many questions, but the first question raised in this case seems never to have been decided in terms, although the authorities permit but one answer thereto, to-wit, that an association, not being an arti-

ficial person or entity, cannot do or be required to do those things which can only be done by a person, natural or artificial, possessing individuality or personality.

The problem is really one of physics, not of law.

In speaking of associations, courts never refer to them as corporate bodies, but invariably refer to them as partnerships.

Thus, in *Goesele* v. *Bimeler*, 14 How. 589, 607, this court speaks of a religious society, formed under articles of association, but not incorporated, as a "partnership."[1]

An association, being in the nature of a partnership, cannot have, as such, citizenship for jurisdictional purposes.[2]

The association, it is true, has a name, just as many partnerships formed for the practice of law have names, but

> "The name which it adopts merely stands for the names of its members, as a matter of convenience."[3]

It is, in fact, a mere "trade name,"[4] descriptive of a "contractual status."[5]

A great majority of partnerships are formed for profit, just as corporations are, but some partnerships and corpora-

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[1] For representative cases describing or treating associations or unincorporated bodies as partnerships, see:

Thomas v. *Ohio State University Trustees*, 195 U. S. 207, 213;

Robbins Co. v. *Cook*, 42 S. D. 136, 173 N. W. 445, 446;

Korstad v. *Williams*, 80 Wash. 452, 141 Pac. 881;

Houghton v. *Grimes* (Vt., Nov. 4, 1926), 135 Atl. 15.

[2] *O'Neil* v. *Co-operative League*, 278 Fed. 737.

[3] *Campbell* v. *Floyd*, 153 Pa. St. 84, 25 Atl. 1033, 1036.

[4] *Moskal* v. *New Era Commercial Ass'n.*, 228 Ill. App. 278, 280.

[5] *Martin* v. *Hemphill* (Com. of App., Tex., Sec. B, Feb. 15, 1922), 237 S. W. 550, 553.

tions do not have the making of profits as the object of their existence.

A knowledge of what might be called business nomenclature leads to the conclusion that those organizations which are not created for profit have adopted the name "association," which differentiates them from ordinary business enterprises, just as "corporation sole" distinguishes that particular kind of corporate entity from all others.

The *genus* is not changed, however, by the descriptive name given to the *specie*.

B. The outstanding difference between an unincorporated association and a corporation is that the former, like a partnership, is not a separate entity and possesses no individuality.

1. An association, as such, cannot own property.

In *Baptist Association* v. *Hart's Executors*, 4 Wheat. 1, this court had before it the question of whether or not an unincorporated association could take under a will. Speaking for the court, which decided the question in the negative, Mr. Chief Justice Marshall said (p. 27):

> "It was obviously the intention of the testator that the association should take in its character as an association; and should in that character perform the trust created by the will. * * * This association is described with sufficient accuracy to be clearly understood; but not being incorporated, is incapable of taking this trust as a society."

"To the same effect, see:

Owens v. *The Missionary Society*, 14 N. Y. 380;

Downing v. *Marshall*, 23 N. Y. 366;

Schein v. *Erasmus Realty Co., Inc.*, 194 App. Div. 38, 184 N. Y. S. 840;

Normandy Consol. School Dist. v. *Harral* (Mo., Div. 1, July 30, 1926), 286 S. W. 86.

This case is made stronger by the fact that the attorney general, presenting the case for the association, argued (p. 15) that the incorporation of the association, soon after the death of the testator, presented an entity capable of taking.

Counsel's argument was answered by the court as follows (p. 28):

> "At the death of the testator, then, there were no persons in existence who were capable of taking this bequest. Does the subsequent incorporation of the association give it this capacity?
>
> The rules of law compel the court to answer this question in the negative. The bequest was intended for a society which was not at the time, and might never be, capable of taking it. According to law, it is gone forever. The legacy is void; and the property vests, if not otherwise disposed of by the will, in the next of kin. A body corporate afterwards created, had it even fitted the description of the will, cannot devest this interest, and claim it for their corporation."

In *Heiligenstein* v. *Schlotterbeck*, 300 Ill. 206, the supreme court of Illinois had before it the question of the validity of a deed of 60 acres to a church, there being some question in the case of whether or not the church was a corporation. In holding that the deed was void, the court said (p. 212):

> "We do not find it necessary to determine whether St. Claire's Roman Catholic Church of Altamont is a corporation, because this deed is void regardless of our conclusion on that point. If the church is a corporation the deed is void because the conveyance is in violation of the statute.[1] • • • If the church is a mere voluntary

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[1] Limiting religious corporations to the ownership of not more than 20 acres.

association of individuals for religious purposes it is not a person, natural or artificial, nor is it any other entity that may be the owner of property."

The cases do not support the theory which the government must advance, to wit, that an unincorporated trade association is a person or entity, natural or artificial.

Even in the case of unincorporated joint-stock companies, which more closely resemble a corporation than does an informal trade association, courts hold that no separate entity exists and that the unincorporated company is in reality nothing more than a partnership.[8]

Courts are unanimous in holding that there is no such thing as an association, as distinguished from its members, any more than there is such a thing as a partnership distinguishable from the partners.[9]

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[8] *Claggett* v. *Kilbourne*, 66 U. S. 346, 348;
Simson v. *Klipstein*, 262 Fed. 823;
Spotswood v. *Morris*, 12 Idaho, 360, 85 Pac. 1094;
Liquid Carbonic Co. v. *Sullivan*, 103 Okl. 78, 229 Pac. 561;
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Butterfield v. *Beardsley*, 28 Mich. 412;
Norwood v. *Francis*, 25 App. D. C. 463, 474;
Bradford v. *National Benefit Ass'n.*, 26 App. D. C. 268, 273.

[9] *Heisse* v. *Industrial Com.*, 288 Ill. 342, 346;
In re Peck, 206 N. Y. 55, 99 N. E. 258, 259;
Union Wine Co. v. *Green*, 115 N. Y. S. 921;
Barber v. *Clendaniel*, 7 Boyce 11, 102 Atl. 84, 86;
People v. *Maljan*, 34 Cal. App. 384, 167 Pac. 547, 549;
Commonwealth Bonding & Casualty Ins. Co. v. *Meeks*, (Tex. Civ. App., Mar. 8, 1916), 187 S. W. 681, 685.

It will serve no useful purpose to analyze the authorities in detail, and we will content ourselves with a quotation from *Ostrom* v. *Greene*, 161 N. Y. 353, 55 N. E. 919, a leading case, wherein the court, in discussing a typical association, said:

> "Corporations, co-partnerships, joint-stock associations, and voluntary associations are organizations of human beings for convenience in transacting business, whether the object be to make money or to do charitable or philanthropic work. They all have some points in common, but in some respects each differs from all the others. The points of resemblance sometimes lead to confusion in determining the rights, powers, and liabilities of the organization under consideration at the time the question arises. The plaintiff's association was neither a corporation nor a co-partnership, and, while it resembled both in some respects, it differed materially from either. It had none of the statutory rights of a corporation, unless the right to sue and be sued in the name of its president may be of a corporate nature. Code Civ. Proc. § 1919. It had no charter from the state giving it certain powers, and subjecting it to certain limitations and liabilities. It had no right to use a common seal; no power of perpetual succession, or of contracting under a corporate name. It was not an artificial person, and had no distinct existence independent of its members. It was not a collective whole, which as such could hold property or dispose of it."

2. An association, as such, cannot enter into contracts.

In *Lewis* v. *Tilton*, 64 Ia. 220, 19 N. W. 911, an action was brought on a lease which had been signed by the four defendants as the "Executive Committee of the 'Ottumwa Temperance Reform Club.'"

In reversing a judgment which, by sustaining a demurrer to the petition, held that the defendants were not personally liable on the lease, the supreme court of Iowa said:

> "It is insisted that the lease shows that credit was extended to the club, and that the contract was made with it; that the principal was named, and therefore the defendants cannot be made individually liable. This line of argument, possibly, would be conclusive if there is a principal. But there is none. The club is a myth. It has no legal existence and never had. It cannot sue or be sued. The defendants contracted in the name of the supposed principal; that is, they claimed there was a principal for whom they were acting, but it now appears there is no principal known to the law. But under the allegations of the amended petition it should be assumed, we think, there was, as a matter of fact, a body of men associated together for a benevolent purpose, who had assumed the name above stated for the avowed purpose, by their united efforts, of suppressing intemperance. There is, however, some doubt in our minds whether it can be said that the plaintiff extended credit to an organization that had no legal existence. As the law does not recognize such an organization, we are at a loss to know how or why it can be said, as a matter of law, the plaintiff contracted with and extended credit to a mere myth. In legal parlance the organization cannot be named. It has no habitation or place of abode."[10]

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[10] To the same effect, see:

Fredendall v. *Taylor*, 23 Wis. 538, 26 Wis. 286;
Grand International Brotherhood of L. E. v. *Green*, 206 Ala. 196, 89 So. 435.

In *Lawler* v. *Murphy*, 58 Conn. 294, 20 Atl. 457, the case as even stronger, for there the contract was signed as follows:

"In witness whereof the said A. O. H. State Insurance Fund hath, by its president and secretary, signed and delivered this certificate at its office, this 12th day of July, 1886.

John D. Cunningham,
Secretary Ins. Fund.
P. J. O'Connor,
Treasurer Ins. Fund.
John P. Murphy,
President Ins. Fund."

Thus, the association, *as such*, purported to contract in the manner usually adopted by corporate entities.

The supreme court of Connecticut, however, reached the ne conclusion that was reached in the *Lewis* case, *supra*, d that the individual signers were personally responsible, l said:

"If, as the statute permits, the organization consisted simply of individuals united under a distinguishing associate name for business purposes, they did not thereby acquire either corporate power or immunity from individual liability."

An association, as such, cannot sue in the name its members have assumed for business purposes.

n *Donovan* v. *Danielson*, 244 Mass. 432, 138 N. E. 811, the l court had given judgment in favor of the plaintiffs, who l brought the suit as the Grand Executive Council and the and Court of Massachusetts, Foresters of America. The ociation had specifically provided, in its constitution, that

"All suits at law, as complainant or defendant, or for the recovery of property or money, shall be conducted by the Executive Council in the name of the Grand Court • • •."

The supreme court of Massachusetts, however, reversed the decree and ordered a dismissal of the bill, stating its reasons as follows:

> "The Grand Court is an unincorporated association; being such, the Grand Court cannot sue or be sued in the character of a corporate body, 'for it is the exclusive prerogative of the government to create corporations, and invest them with the power of suing, as such, by their corporate name.' Story, Equity Practice (10th Ed.) § 497, note. Such an organization is a partnership, and in law must sue and be sued in the names of all the members of the partnership, in the absence of legislative authority. * * * It is plain the association was without power to authorize the Grand Executive Council to sue in its name or as the Grand Court of Massachusetts."

In *Nightingale* v. *Barney*, 4 Greene (Ia.) 106, it was said that

> "None but a natural or artificial person can become a party to a suit. An unincorporated association, such as a masonic lodge, cannot be recognized as a person or party at law, and hence cannot sue or be sued."

In *Roberts* v. *Kennedy*, 13 Del. Ch. 133, 116 Atl. 253, the chancellor, in discussing "the fundamental difference existing between a corporation on the one hand and an unincorporated association of individuals on the other," said:

> "The corporation, being an artificial person, has a distinct entity of its own, can hold and possess property, own choses in action, and sue and be sued in its own name. Therefore, when its stockholders undertake to sue in its behalf, they assert rights that are the corporation's and which the corporation is capable of litigating in its own name. Hence, while the stockholders have an interest in the corporation's property, an interest which a court of equity will in proper cases pro-

tect, they cannot, in the absence of exceptional circumstances, litigate such interest unless the corporation, through its proper officers, first refuses to do so. The primary right is in the corporation. • • •

But an unincorporated association of individuals such as is the Brotherhood in this case, has no identity of its own and cannot sue. The property and rights which are said to belong to it, belong in fact to its members." "

we will hereafter demonstrate, when Brown claimed stitutional right to be exempt from producing evidence st himself and to be free from unlawful searches and res, he was claiming *his* right, not the right of some person or entity.

An association, as such, cannot in the absence of statute, e sued by the name its members have, for convenience, ssumed.

those cases wherein the plaintiff attempted to sue an ation *as such*, courts have uniformly held that, in the ce of statute, this could not be done, because an asso-n

has no legal existence as an aggregation." "

the same effect, see:

Karges Furniture Co. v. *Amalgamated W. L. U. No. 131*, 165 Ind. 421, 75 N. E. 877;
New England States Sangerbund v. *Fidelia Society*, 218 Mass. 174, 105 N. E. 629;
Marshalltown Mut. Plate Glass Ins. Ass'n v. *Bendlage*, 195 Ia. 1200, 191 N. W. 97;
St. Paul Typothetae v. *St. Paul Bookbinders' Union No. 37*, 94 Minn. 351, 102 N. W. 725.

ciety of Shakers v. *Watson* (6 C. C. A.), 68 Fed. 730, 737.

In the leading case of *Pickett* v. *Walsh*, 192 Mass. 572, 78 N. E. 753, the supreme court of that state said:

> "There is no such entity known to the law as an unincorporated association, and consequently it cannot be made a party defendant."[10]

Thus, an association is a kind of partnership, operated under a trade name, having no entity or existence apart from that of its members, unable to have, do or possess anything except as its members have, do or possess the thing in question. It cannot be "found" by the marshal, it cannot accept service of process, it cannot travel in response thereto,—"it" isn't!

The subpoena in this case, then, was directed to a partnership, trade name, or contractual status.

In view of the law as we have demonstrated it to be, we respectfully submit that this court must answer in the negative the first question certified (rec. 3), unless the court find that the *Hale* or *Coronado* cases are applicable here.

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[10] To the same effect, see:

Brown v. *Protestant Episcopal Church*, 8 F. (2d) 149;

In re Waters of Willow Creek (Ore., May 26, 1925), 236 Pac. 487;

Cousin v. *Taylor*, 115 Ore. 472, 239 Pac. 96;

Moskal v. *New Era Commercial Ass'n.*, 228 Ill. App. 278;

Thurmond v. *Cedar Spring Baptist Church*, 110 Ga. 816, 36 S. E. 221;

Tucker v. *Eatough*, 186 N. C. 504, 102 S. E. 57;

State v. *Kansas City Live Stock Exchange*, 211 Mo. 181, 109 S. W. 675.

The law has not been changed by the Hale and Coronado cases. This court has not endowed unincorporated associations with individuality.

The reasoning of the *Hale* case does not apply to this case.

In *Hale* v. *Henkel*, 201 U. S. 43, this court held that a poration could not claim a constitutional right to decline produce evidence against itself, and that an officer could claim a like right in refusing to produce documents beging to the corporation, which would incriminate him sonally. The right of an individual "to carry on his vate business, in his own way" and to refuse "to divulge business, or to open his doors to an investigation, so as it may tend to criminate him" was expressly recized.

he reasoning upon which the decision was based was ated in *Wilson* v. *U. S.*, 221 U. S. 361, wherein this t made plain the fact that the documents, being the prop- of the corporation, a separate entity, and not the prop- of the custodian, were subject to examination by virtue he visitatorial powers of the sovereign.

t the United States possesses no such visitatorial powers individuals, whether they be operating as such or as rtnership, which is created and exists by virtue of pri- contract, not statutory authority.

Karges Furniture Co. v. *Amalgamated W. L. U. No.* 165 Ind. 421, 75 N. E. 877, the court said:

"On the other hand, in the absence of an enabling statute defining the rights and liabilities of the members, societies, associations, partnerships, and other bodies, combined under their own rule, for their own private benefit, and without any express sanction of law, are not, in the collective capacity and name, recognized at common law as having any legal existence distinct from their members."

Partnerships, like individuals, owe no duty to the United States except such as is owed by all citizens generally,—to be law-abiding, etc.

The members of partnerships, being individuals, are protected by the constitution from being required to give evidence against themselves.

This very point arose in *U. S.* v. *Brasley*, 268 Fed. 59, wherein a motion was made for the return of certain documents which had been seized under a subpoena duces tecum directed to "Brasley-Krieger Shoe Company, Simon Brasley, Leon Krieger and Bessie B. Cohen."

The company was, in fact, a partnership.

The district court held that the documents were the property of the individuals and they were ordered returned.

2. The *Coronado case* is based upon the familiar theory of presence by representation.

In *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, this court held that the members of a labor union could be sued by their partnership or trade name.

Notwithstanding the fact that the court said, in *Coronado Coal Co. v. United Mine Workers of America*, 268 U. S. 295, 58/297, that in the first *Coronado* case it had been held that the unions "were, though unincorporated associations, subject to suit under the Anti-trust Act," we submit that the decision of the court was not rested upon the theory that the labor union existed as an entity, separate and apart from its members. The question then before the court was (p. 390) "merely a procedural matter," and the decision, like statutes which permit a similar result,* made no change in the essential nature of associations.

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* *E. I. Du Pont De Nemours Powder Co.* v. *Jones Bros.*, 200 Fed. 638, 641 2.

It is submitted that the protection afforded the individual by the constitution and its amendments is matter of substance, not merely of procedure.

The limitations inherent in the *Coronado* case have been succintly stated by Circuit (then District) Judge Learned Hand as follows:[11]

> "In that case the court affirmed the jurisdiction of the District Court over a trade union of some 450,000 members, in the United States and Canada. Over some of the members, the officers of a number of the locals, and the officers of the Union, jurisdiction had been got in usual form, and it was held that this brought in the association as a whole. The decision did not effect a general change in the status of such associations; rather, it turned upon the character of a trade union as such, especially because of its repeated recognition in statutes of the United States as an entity. It is to be read as applicable only to such cases.
>
> Moreover, in that case some of the members had been served, and personal judgment could have been got against them in any event. The action sounding in tort, it was not necessary to join all the joint tortfeasors. It nowhere appears that the Supreme Court supposed that judgment could have been entered against those members who were outside of the jurisdiction, and I venture to believe that it could not. The court was interested in whether the union funds could be reached on execution, and that was all."

Lest it be hereafter contended too seriously by counsel the United States that the mere recognition, in a statute, the association as a body which may be proceeded against some purposes results in the association's acquiring an

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[11] *United States & Cuba A. W. E. Corp.* v. *Lloyds*, 291 Fed. 889, 891-2.

entity, and in the individual members thereof losing their constitutional privileges, we may ask, *in limine*, what is to be done about "partnerships," "societies," "trusts," "estates," "firms," "committees," "companies," "two or more persons having a joint or common interest," "a body incorporate" and any "other unincorporated body of individuals?" All of these groups have been recognized by statutes, which have been gathered together in the appendix hereto.

One statute, in particular, recognizes a partnership[16] in exactly the same words as the Sherman Act recognizes an association.[17] How distinguish between the two?

If the words "existing under or authorized by" had been "organized under," there would be no doubt but that the associations meant were those which "are the creation of statutory law," or which "derive from that source some quality, or benefit not existing at the common law."[18]

On the other hand, if the words had been "created or organized in," there would have been no doubt but that it was meant to include common law associations.[19]

What do the words "existing under or authorized by" mean?

In the first place, what is meant by "laws?"

We submit that that word means "statutes."

In the ordinary use of language, "laws" means statutory laws, and it does not include within its meaning the rules of the common law. If all rules and regulations governing human conduct be meant, the appropriate expression is "the

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[16] Act of Sept. 7, 1916, ch. 451, § 1, 39 Stat. L. 728, Act of July 15, 1918, ch. 152, § 1, 40 Stat. L. 900.

[17] Act of July 2, 1890, ch. 647, § 8, 26 Stat. L. 210.

[18] *Eliot* v. *Freeman*, 220 U. S. 178, 186.

[19] *id.*, p. 187.

[20] *Hecht* v. *Malley*, 265 U. S. 144, 155.

law," not "laws." This association is not included, then, because it does not exist under, nor is it authorized to exist by, any statute.

In the second place, of what is "existing under or authorized by" descriptive,—of "associations" only, or of "corporations" also?

A natural reading of the statute impels us to the belief that the words are descriptive of both. If so, then is there a difference between a corporation "existing under or authorized by" the laws of a state, and one "organized under" those laws? It would seem not. Can these words, then, have any different meaning when applied to "associations?" If so, then the only possible difference is that the expression "organized under" connotes an affirmative statute which grants privileges or powers, upon compliance therewith, while the expression "existing under or authorized by" connotes a passive, declaratory statute, which merely states, in effect, that that which has been lawful shall continue to be so. If the two expressions be essentially the same, then only those associations have been given an entity which have acquired, by statute, a quasi-corporate existence. This, being a voluntary unincorporated association (rec. 2), is not such.

In the last analysis, however, the question is not one of the construction of a statute, divorced from the constitution and its amendments, but is one of power.

We submit that an individual cannot be deprived of his constitutional immunities by so simple a process as saying to him, by statute, that inasmuch as he has associated himself in business with another man as an association, partnership, committee, company, firm, society, or other unincorporated body of individuals, the group is an entity and his documents are now the group's and must be produced upon demand. If this can be done, then the constitution has been limited, by statute, to those individuals who are in business by them-

selves, without associates, for if, by statute, the constitution can be made inapplicable to individuals who are members of an association, then it can be made inapplicable to individuals who are members of the other groups, which are merely different *species* of the same *genus*.

We submit that no such power exists in the legislative branch of the government, and that the statute being procedural only, the *Coronado* case, when correctly analyzed, stands only for the application to an action at law of the familiar equity rule of presence by representation, which has sometimes been applied in association cases.[21]

It would seem that if ever a case existed where the parties were too numerous to be brought conveniently into court, it is a case where there are 450,000 parties, scattered all over the United States and Canada.

Cessante ratione legis, cessat ipsa lex.

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[21] See:

Beatty v. *Kurtz*, 2 Pet. 566;

Iron Molders' Union v. *Allis-Chalmers Co.* (7 C. C. A.), 166 Fed. 45, 48;

Spaulding v. *Evenson*, 149 Fed. 913, affirmed (9 C. C. A.), 150 Fed. 517;

National Harness Mfgs. Ass'n. v. *Federal Trade Com.* (6 C. C. A.), 268 Fed. 705.

Part II.

Question 2.

Would the answer to question no. 1 be affected if it appear that the members of such voluntary unincorporated association were all corporations?

The answer to the second question, which we suggest should be in the affirmative, is to be found in a consideration of that fundamental question which underlies the entire problem, to wit,—To whom do the documents belong?

We predicate our comments upon the assumption that the documents belong to the members of the association, the latter being a nonentity incapable of owning property except in the very loose sense in which we speak of the books of a partnership, meaning thereby only that the particular books in question, the property of the partners, contain a record of the acts and doings of the individuals engaged in a particular enterprise.

On the assumption above stated, the documents would belong to the corporations, and the secretary of the association, necessarily a non-member by the phrasing of the question, would have no proprietary rights therein. In no sense of the word could they be said to be *his* documents. We fail to see that his position would differ in any respect from that of any other custodian of the corporate records.

There can be no doubt about the fact that the documents would be corporate records, whether the custodian were another corporation, a partnership, or an individual."

" *U. S.* v. *Invader Oil Corp.*, 5 F. (2d) 715;
Woodworth v. *Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893;
Martin v. *D. B. Martin Co.*, 10 Del. Ch. 211, 88 Atl. 612.

Part III.

Question 3.

Would the fact that the secretary of such voluntary unincorporated association is also a member of such association, entitle him to claim the protection of the fourth or fifth amendment to the constitution, notwithstanding the subpoena called for the papers that belonged to and were in the possession of the said voluntary unincorporated association?

The answer to this question, which we suggest may be either in the affirmative or in the negative, will depend upon the answer to the question,—Who has the actual custody of the documents?

In an association of individuals and corporations, such as is assumed by the phrasing of the question, both have equal rights to the property.[23] The documents cannot be said to be the property of the corporations any more than they are the property of the individuals, or vice versa. They are, however, the property of each to the same extent that they are the property of the other.[24]

If, then, the documents are in the possession of a corporate member, to whom a subpoena has been issued, the question,

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[23] *Houston* v. *Dexter & Carpenter*, 300 Fed. 354;
Quitman Oil Co. v. *McRee*, 18 Ga. App. 128, 88 S. E. 921;
Salem-Fairfield Tel. Ass'n. v. *McMahan*, 78 Ore. 477, 153 Pac. 788;
Wilson v. *Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249;
14a C. J. 293.

[24] *Amusement Syndicate Co.* v. *Marthing*, 108 Kan. 798, 196 Pac. 1058;
Moore v. *Hillsdale County Tel. Co.*, 171 Mich. 388, 137 N. W. 241;
Browning v. *Cover*, 108 Pa. St. 595.

e submit, should be answered in the negative, for citations
e not necessary to support the statement that one entity,
thout constitutional privilege, cannot plead the constitu-
nal immunity of another entity.

If, however, the documents be in the custody of the indi-
dual, then they are the property of the individual,[25] who
no more bound to produce them than he is to testify
their contents.[26]

CONCLUSION.

It is respectfully submitted that Brown was correct when
called the attention of the grand jury to the fact that the
sociation was a bodiless trade name, without being, citizen-
p, books, papers or property, unable to travel or to appear
response to a subpoena, and unable to have such a thing
a custodian of books and records which it could not own
possess.

Moreover, assuming that the association is an entity, and
t the documents are therefore its property, by virtue of
at kind of a visitatorial right has the United States ac-
red the privilege of inspecting its books and records?
s question, we submit, presents difficulties of major im-
tance.

We have here no "utter impossibility of doing justice
erwise" than by determining that this, and hence every,
sociation, and hence every partnership, is a legal entity.

U. S. v. *Brasley*, 268 Fed. 59.

Ballman v. *Fagin*, 200 U. S. 186; *Internal Revenue Agent* v. *Sullivan*, 287 Fed. 138.

If the United States desires Brown's books and papers, they are obtainable by means of a subpoena directed to Brown as a witness.

Respectfully submitted,

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ROBERT N. GOLDING,
Counsel for Arthur C. Brown.

APPENDIX

The following groups, in addition to associations, have been recognized by statutes of the United States:

1. "Committee, any organization or group of persons:"
   Federal Corrupt Practices Act, U. S. C., title 2, sec. 241.

2. "Company:"
   The Insecticide Act, Act of April 26, 1910, ch. 191, § 13, 36 Stat. L. 335;
   Act of August 20, 1912, ch. 308, § 11, 37 Stat. L. 319;
   Act of February 5, 1917, ch. 29, § 1, 37, 39 Stat. L. 874, 897;
   Act of May 20, 1926, ch. 346, § 1, 44 Stat. L. 576;
   White Slave Traffic Act, Act of June 25, 1910, ch. 395, § 7, 36 Stat. L. 827;
   Act of June 30, 1906, ch. 3915, § 12, 34 Stat. L. 772;
   Act of May 22, 1918, ch. 81, § 4, 40 Stat. L. 559;
   R. S. § 3140, Act of February 27, 1877, ch. 69, § 1, 19 Stat. L. 248;
   Act of January 26, 1926, ch. 27, § 703, 44 Stat. L. 97;
   Act of March 23, 1906, ch. 1130, § 7, 34 Stat. L. 86.

3. "Estate:"
   Act of June 2, 1924, ch. 234, § 2, 43 Stat. L. 253.

4. "Firm:"
   Act of February 20, 1905, ch. 592, § 29, 33 Stat. L. 731;
   Act of October 6, 1917, ch. 83, § 4, 40 Stat. L. 386.

5. "Partnership:"

Act of Sept. 8, 1916, ch. 463, § 800, 39 Stat. L. 798;
China Trade Act, Act of Sept. 19, 1922, ch. 346, § 1, 42 Stat. L. 849;
Act of August 24, 1921, ch. 80, § 1, 42 Stat. L. 181;
Act of August 24, 1912, ch. 373, § 12, 37 Stat. L. 502;
Act of June 7, 1924, ch. 346, § 1, 12, 43 Stat. L. 650, 652;
Act of May 20, 1926, ch. 346, § 1, 44 Stat. L. 576;
Act of June 10, 1910, ch. 285, § 5, 36 Stat. L. 465;
Act of March 4, 1923, ch. 262, § 1, 42 Stat. L. 1486;
Act of May 22, 1918, ch. 81, § 4, 40 Stat. L. 559;
R. S. § 3140, Act of February 27, 1877, ch. 69, § 1, 19 Stat. L. 248;
R. S. §1, U. S. C., title 1, sec. 1;
Federal Corrupt Practices Act, U. S. C., title 2, sec. 241;
Act of June 2, 1924, ch. 234, § 2, 43 Stat. L. 253;
The Grain Futures Act, Act of Sept. 21, 1922, ch. 369, § 1, 42 Stat. L. 998;
Act of March 4, 1923, ch. 288, § 11, 42 Stat. L. 1519;
United States Grain Standards Act, Act of August 11, 1916, ch. 313, § 1, 39 Stat. L. 482;
The Naval Stores Act, Act of March 3, 1923, ch. 217, § 1, 42 Stat. L. 1435;
Packers and Stockyards Act, Act of August 15, 1921, ch. 64, § 1, 42 Stat. L. 159;
Act of August 24, 1912, U. S. C., title 7, sec 114-2 (f);
Act of April 30, 1912, ch. 102, § 5, 37 Stat. L. 107;
Act of January 26, 1926, ch. 27, § 703, 44 Stat. L. 97;
United States Cotton Futures Act, Act of August 11, 1916, ch. 313, 39 Stat. L. 476;
Act of October 28, 1919, ch. 85, § 1, 41 Stat. L. 307;
Act of June 7, 1924, ch. 316, § 2, 43 Stat. L. 604;
Act of August 29, 1916, ch. 415, § 42, 39 Stat. L. 545.

6. "Society:"

The Insecticide Act, Act of April 26, 1910, ch. 191, § 13, 36 Stat. L. 335;
Act of August 20, 1912, ch. 308, § 11, 37 Stat. L. 319;
White Slave Traffic Act, Act of June 25, 1910, ch. 395, § 7, 36 Stat. L. 827;
Act of June 30, 1906, ch. 3915, § 12, 34 Stat. L. 772;
Act of October 6, 1917, ch. 83, § 4, 40 Stat. L. 386.

"Trusts:"

The Grain Futures Act, Act of Sept. 21, 1922, ch. 369, § 1, U. S. C., title 7, sec. 2;
Act of June 2, 1924, ch. 234, § 2, 43 Stat. L. 253.

"Two or more persons having a joint or common interest:"

Act of March 4, 1923, ch. 288, § 11, 42 Stat. L. 1519;
Act of August 29, 1916, ch. 415, § 42, 39 Stat. L. 545.

"Other unincorporated body of individuals:"

Act of May 22, 1918, ch. 81, § 4, 40 Stat. L. 559.

"A body of persons, corporate or incorporate:"

Act of February 29, 1888, ch. 17, § 10, 25 Stat. L. 42.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

No. 23

ARTHUR C. BROWN

vs.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL BRIEF AND ARGUMENT ON BEHALF OF ARTHUR C. BROWN.

WENTWORTH KIRKLAND,
ROBERT N. GOLDING,
Counsel for Arthur C. Brown.

CHICAGO LAW PRINTING COMPANY, CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1927.

ARTHUR C. BROWN

vs.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL BRIEF AND ARGUMENT ON BEHALF OF ARTHUR C. BROWN.

STATEMENT.

This case came here on certificate from the Circuit Court of Appeals for the Seventh Circuit and the points raised by the questions certified have already been discussed by counsel.

The entire record has been ordered up by this court (R. 1)[1] and this supplemental brief will be divided into Part I, a reply to the government's brief already filed, and Part II, a brief and argument on additional points raised by the record.

No opinion was filed by either the Circuit Court of Appeals or the District Court.

[1] All references in this supplemental brief are to the record, No. 33, printed for the October Term, 1927.

Part I.

A reply to the government's argument, in support of its contention that an unincorporated association has become an entity by virtue of the Sherman Act.

The government's reasoning seems to be as follows:

1. That, although an unincorporated association was not an entity at common law,

2. Congress has provided, in the Sherman Anti-Trust Law, that certain restraints of trade committed by persons are unlawful, and has provided, in sec. 8,

> "That the word 'person' or 'persons,' wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country,"

3. Which statutory provision, conferring privileges upon the association as an entity,

4. Makes it necessary to conclude that the association is an entity.

The assumption of the very point in issue makes us conscious of a disturbing circular movement in this argument.

To support the argument, the following points are advanced:—

a. That it has been assumed that unincorporated associations may be proceeded against under the Act.

Lord Denman's reply to a similar argument is so appropriate that we quote it in lieu of presenting the idea in language less clear and concise, to-wit:

> "Several Judges, and many barristers and persons in high situations, have expressed the same opinion in the

same general terms, and they have taken for granted that it might be truly so stated. And I am tempted to take this opportunity of observing, that a large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted.' If a statistical table of legal propositions should be drawn out, and the first column headed 'Law by Statute,' and the second 'Law by Decision;' a third column, under the heading of 'Law taken for granted,' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."[2]

b. That the conception of an entity informally created for a single purpose is not new, citing the example of the corporation sole.

This brings out the real point in the case with delightful frankness. What is the "single purpose" which counsel have in mind? It can be nothing else but the entry into precincts forbidden to the investigating authorities by the constitution.

The use of the corporation sole as an example should make even opposing counsel pause to consider whither their reasoning processes are carrying us.

We tender them for debate this assertion,—

That if Congress can, by its *fiat*, create out of a group of individuals engaged in a particular business, a corporation, against their will, then it can create a corporation sole out

[2] *O'Connell* v. *The Queen*, 11 Cl. & F. at p. 372.

of any individual engaged in a particular business, as selling liquor.

We have discovered no reason why Congress, if it can do the one, cannot do the other.

A simple amendment to each of the existing criminal statutes would result in there being no individual in the United States who could not be compelled to produce his books and papers for use against himself in a criminal proceeding, the constitution to the contrary notwithstanding.

In the cases cited by counsel, the documents had been seized on search warrants. Entirely different questions are raised by that method of procedure when the owner fails to take proper steps to have the documents returned.

It is true that in some of the cases, particularly in the *Haywood* case, the opinion contains language which indicates that the court believed that an unincorporated association was an entity. The certificate in the case at bar may, however, have resulted from a doubt created by an attempt to apply to this case some of the language contained in the opinion in the *Haywood* case.

The *Haywood* case differs from the instant case in one detail of controlling importance.

The United States, in that case, had seized the property and the defendants were attempting to secure a return of the papers. The situation was succinctly stated by the Circuit Court of Appeals as follows (298 Fed. at 804):

> "Each defendant moved for the return of property that had never been in his possession and was not taken from his person or home or place of business. When asked by the court to specify what property had been taken from each and how their several privacies had been invaded, they declined."

In the instant case, Brown has the documents, in his possession. If he be forced to deliver them to the grand jury and/or the United States, it is obvious that he will have been obliged to give up actual possession of specific papers, which can be described exactly and in full detail.

Part II.

BRIEF AND ARGUMENT ON ADDITIONAL POINTS.

Brief of Argument.

Brown should not have been held in contempt for the following reasons:

A. The subpoena was too broad and all-inclusive.

Hale v. *Henkel*, 201 U. S. 43;
In re American Sugar Refining Co., 178 Fed. 109;
Rawlins v. *Halls-Epps Clothing Co.* (5 C. C. A.), 217 Fed. 884;
Ex parte Jaynes, 70 Cal. 638, 12 Pac. 117;
Ex parte Gould, 60 Tex. Cr. R. 442, 132 S. W. 364;
American Car & Foundry Co. v. *Alexandria Water Co.*, 221 Pa. 529, 70 Atl. 867;
State v. *Davis*, 117 Mo. 614, 23 S. W. 759.

B. No showing of materiality was made.

Miller v. *Mutual Reserve Fund Life Ass'n.*, 139 Fed. 864;
U. S. v. *Terminal R. Ass'n.*, 154 Fed. 268;
Daniel v. *Goodyear Shoe Machinery Co.*, 128 Fed. 753;
State v. *Wurdeman*, 176 Mo. App. 540, 158 S. W. 436;
Kullman, Salz & Co. v. *Superior Court*, 15 Cal. App. 276, 114 Pac. 589.

ARGUMENT ON BEHALF OF ARTHUR C. BROWN.

A. The orders of the district court compel Brown to produce his own documents, for use against himself in a criminal proceeding, in violation of his constitutional rights.

This was an attempt to obtain evidence for use in the trial of an indictment brought against Brown and others, who had been indicted for alleged violations of the Sherman Anti-Trust law, arising out of their connection with the association. This indictment had already been found, had been returned, and the cause was pending in the district court when the subpoena in this case was issued. (R. 5.)

Brown was first subpoenaed *personally* to bring the documents in question before the grand jury. He complied with the terms of the subpoena, but when he insisted upon being treated as a witness, so that he might gain immunity under the statute,[3] which provides for such cases as this, no one wanted the documents and he was dismissed. (R. 5-6.)

Thereafter, this present subpoena was issued, directed to the partnership, service being made upon Brown. (R. 1.)

It seems too plain for further argument that these documents, being partnership papers, were the property of Brown,[4] who was no more bound to produce his documents than he was to testify to their contents.[5]

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[3] Act of Feb. 25, 1903, Sec. 1, Ch. 755, 32 Stat. L. 903, 4 Fed. Stat. Ann. (2 ed.) 567.

[4] *U. S.* v. *Brasley*, 268 Fed. 59.

[5] *Ballman* v. *Fagin*, 200 U. S. 186;
Internal Revenue Agent v. *Sullivan*, 287 Fed. 138.
Semble, *Thompson* v. *U. S.*, 10 F. (2d) 781.

B. The subpoena was too broad and all-inclusive.

This subpoena demanded the production of

> "All letters or copies of letters, telegrams or copies of telegrams,"

which passed between the association, its predecessor association, their officers and agents and the members thereof,

> "including corporations, partnerships and individuals, and their respective officers and agents." (R. 2.)

The period covered was three years, five and one-half months.

The matter under investigation was "the manufacture and sale of case goods." (R. 2.)

Brown's objections to the breadth of this subpoena were specifically made in his sworn answer to the first presentment. (R. 6.)

In *Hale* v. *Henkel*, 201 U. S. 43, this court held invalid a subpoena which called for the production of all contracts and correspondence between the corporation

> "and no less than six different companies,"

as well as all letters received by the corporation

> "from more than a dozen different companies."

The subpoena in this case required the production of letters and telegrams passing between 192 persons. (R. 6.)

A subpoena, more specific and less comprehensive than this, was held invalid in *In re American Sugar Refining Co.*, 178 Fed. 109.

An equally broad subpoena was held invalid in *Ex parte Gould*, 60 Tex. Cr. R. 442, 132 S. W. 364, wherein the court, quoting from *Ex parte Brown*, 72 Mo. 83, said:

"To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness summoned before them, without reference to any particular offense which is a subject of inquiry, what he knows touching the violation of any section of the Criminal Code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

Moreover, the subpoena in this case called for the production of all letters and telegrams

"relating to the manufacture and sale of case goods." (R. 2.)

No warrant exists in law for the issuance of a subpoena which requires the witness, at his peril, to determine what documents come within such a description in a subpoena which called for no specific papers.[6]

In *Ex parte James*, 70 Cal. 638, 12 Pac. 117, the witness had been subpoenaed to produce all telegrams passing between certain designated persons within a given period of time. The witness refused to obey and was sentenced for contempt.

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[6] *Rawlins* v. *Hall-Epps Clothing Co.* (5 C. C. A.), 217 Fed. 884, 887.

In ordering his release on habeas corpus, the court said:

> "He was required to search for and produce all messages from a number of persons, to many other persons between certain specified dates. The service of the subpoena was an evident search after testimony. The petitioner was not bound to respond, and committed no contempt in failing to examine the papers under his control to ascertain if any such messages had been sent or received."

C. No showing of materiality was made.

The presentments alleged that

> "the evidence called for in said subpoena is important and material." (R. 4, 8.)

Brown's answer specifically raised the point that

> "said subpoena fails to show that the documents described therein are important or material." (R. 6.)

A bare allegation of materiality and importance, without facts to support it, is insufficient.[7]

In *Miller* v. *Mutual Reserve Fund Life Ass'n.*, 139 Fed. 864, the court refused to punish a witness for contempt for refusing to obey a similar subpoena, saying:

> "It was not expected that any such grotesque subpoena *duces tecum* as we have here would ever be taken out, calling for apparently a cart load of books and papers, nearly all of which, so far as their description indicates, have nothing whatever to do with the issues raised by the pleadings. The motion to punish for failure to obey

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[7] *Daniel* v. *Goodyear Shoe Machinery Co.*, 128 Fed. 753, 762;
Kullman, Salz & Co. v. *Superior Court*, 15 Cal. App. 276, 114 Pac. 589, 593;
State v. *Wurdeman*, 176 Mo. App. 540, 158 S. W. 436, 437.

> this omnibus subpoena is denied. If in this long enumeration there are a few items which possibly might have some bearing on the controversy, complainant may take out new and separate subpoenas for them. The court will then look into the merits of each separate application to produce."

Much of the matter described in the subpoena may have little or no bearing upon any violation of the Sherman Anti-Trust law. It is beyond the bounds of reason to assume that *every* letter and telegram exchanged between 192 persons, during a period of over three years, had to do with violating the law.

The truth of the whole matter is, this subpoena is merely a search for evidence, to be used against Brown, on the trial under the indictment.

> "Seeking the production of papers and documents for the purpose of finding out whether or not they contain information valuable to the party demanding them has been aptly denominated a 'fishing examination,' and is always regarded as oppressive, and as such denied."[8]
>
> "It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant and irrelevant, in the hope that something will turn up."[9]

---

[8] *U. S.* v. *Terminal R. Ass'n.*, 154 Fed. 268, 272.

[9] *Federal Trade Com.* v. *American Tobacco Co.*, 264 U. S. 298, 306.

CONCLUSION.

It is submitted that Brown was correct when he called the attention of the grand jury to the fact that the association was not an entity and could not, therefore, respond to the subpoena.

It is further submitted that Brown was justified in declining to produce his papers or to answer questions until and unless he personally was subpoenaed and sworn as a witness.

It is further submitted that, even though it be held that Brown had to respond to a subpoena addressed to an association, nevertheless Brown was justified in refusing to answer questions, because the subpoena contained no *ad testificadum* clause, and that the present subpoena was so indefinite and sweeping as to constitute an unlawful search and seizure.

The judgment of the trial court should be reversed.

Respectfully submitted,

Weymouth Kirkland,
Robert N. Golding,
Counsel for Arthur C. Brown.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 33

ARTHUR C. BROWN

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinions were filed by the District Court or the Circuit Court of Appeals.

JURISDICTION

The case came before this Court on certificate from the Circuit Court of Appeals for the Seventh Circuit, pursuant to Section 239 of the Judicial Code, as amended by the Act of February 13, 1925. Thereafter, this Court ordered that the entire record be certified to it, "so that the whole matter in controversy may be considered by the Court"

(R. 1.), and the case is now here as if on writ of error to the District Court.

QUESTIONS PRESENTED

In this, a criminal contempt proceeding against the secretary of an unincorporated association for disobedience of a *subpœna duces tecum* requiring production before a grand jury of correspondence and records of the association, the questions are:

1. Whether the secretary was justified in refusing production because the subpoena was directed to the association and not to him personally, although it was followed by an order of the court directed to him personally, requiring him to obey it.

2. Whether the subpoena was so indefinite in its description of the documents required and called for so many as to violate the Fourth Amendment, prohibiting unreasonable searches.

3. Whether the secretary of the voluntary association justified his disobedience of the subpoena and order, requiring him to produce records of the association in his custody, by claiming their production would incriminate him, where he failed to show that he was a member of the association or had any proprietary interest in the papers, and also failed to show that the members of the association were not corporations.

STATEMENT

The plaintiff in error is seeking to reverse a judgment of the United States District Court for the Northern District of Illinois adjudging him in con-

tempt for refusal to comply with a subpœna duces tecum and an order of the court, requiring him, the secretary of a voluntary association, known as the National Alliance of Furniture Manufacturers, to produce certain books and papers of that organization before a grand jury. The questions certified were:

> Question 1. Can the court compel through a subpœna duces tecum the production of the books and papers of a voluntary unincorporated association, over its protest?
>
> Question 2. Would the answer to Question No. 1 be affected if it appear that the members of such voluntary unincorporated association were all corporations?
>
> Question 3. Would the fact that the secretary of such voluntary unincorporated association is also a member of such association, entitle him to claim the protection of the Fourth or Fifth Amendment to the Constitution, notwithstanding the subpœna called for the papers that belonged to and were in the possession of the said voluntary unincorporated association?

The case is now here as if on appeal from or writ of error to the United States District Court, and the entire record which has been certified up, presents the case in a somewhat different aspect from that it bore on the statement accompanying the certified questions.

The United States District Court for the Northern District of Illinois issued a *subpœna duces tecum* without *ad testificandum* clause (R. 1), di-

rected to "National Alliance of Furniture Manufacturers, Grand Rapids Savings Bank Building, Grand Rapids, Michigan," commanding it to appear before the Federal grand jury in Chicago and produce:

> All letters or copies of letters, telegrams or copies of telegrams, incoming and outgoing, passing between the National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations, their officers and agents, and the several members of said National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations (including corporations, partnerships, and individuals, and their respective officers and agents) during the period from January 1, 1922, to June 15, 1925, relating to the manufacture and sale of case goods, and particularly with reference to—
>
> (a) General meetings of Alliance.
>
> (b) Zone meetings of Alliance members.
>
> (c) Costs of manufacture.
>
> (d) Grading of various types of case goods.
>
> (e) Issuing new price lists.
>
> (f) Discounts allowed on price lists.
>
> (g) Exchanging price lists.
>
> (h) Maintaining prices.
>
> (i) Advancing prices.
>
> (j) Reducing prices.
>
> (k) Rumors of charges of price cutting.
>
> (l) Discounts, terms and conditions of sale, etc.

(m) Curtailment of production.

(n) The pricing of certain articles or suits of furniture by W. H. Coye.

(o) Cost bulletins.

(p) Intention of W. H. Coye and A. C. Brown to attend furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y., and meetings of members held prior to and during said furniture markets or expositions.

(q) Conditions obtaining at various furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y.

(r) Manufacturers maintaining a fair margin of profit between cost prices and selling prices.

This subpoena was served upon the Association by service upon the plaintiff in error, Arthur C. Brown, who was the secretary of the Association. (R. 3.) The grand jury was then engaged in an inquiry concerning violations of the antitrust laws of the United States by the furniture manufacturers. (R. 4.)

It appears that National Alliance of Furniture Manufacturers is "the name assumed by a voluntary organization of furniture manufacturers and that said organization is not a corporation either *de jure* or *de facto*." (R. 5.) It does not appear from the record whether the members of the association were corporations, individuals, or copartnerships, although the subpoena was drawn to in-

clude correspondence with members of the association and of its predecessor "including corporations, partnerships, and individuals." (R. 2.) For all that the record discloses they may all have been corporations. It does not appear that the plaintiff in error, Brown, was a member of the association, or that he had any proprietary interest in it, or in its books or papers described in the subpoena, or that he was anything other than a salaried employee or agent.

Brown appeared before the grand jurors (R. 3) without producing any of the papers described in the subpoena and refused to say anything about the matters mentioned in the subpoena unless he should first be subpenaed and sworn, at the same time producing and reading to the grand jurors a statement as follows (R. 3):

> GENTLEMEN OF THE GRAND JURY: There has been served upon me a subpoena dated July 13, 1925, ordering National Alliance of Furniture Manufacturers to appear on July 17, 1925, before your honorable body in Chicago.
>
> There is no such person or entity as National Alliance of Furniture Manufacturers which is capable of being served with a subpoena or of appearing here in answer to one. I have appeared here today, in deference to your official position, to inform you of that fact.

He "refused to say, when asked, whether his refusal to comply with said subpoena was because

so to do would incriminate him" (R. 4), thus expressly declining to assert the constitutional privilege. He was then presented to the court as a contumacious witness, and, in response to the presentment by the grand jury, filed an answer (R. 4), in which he set forth that he had stated to the grand jury that there was no such entity as National Alliance of Furniture Manufacturers capable of being served with a subpoena and that he had declined to answer as he had not been subpoenaed; he alleged that the matter under investigation by the grand jury was the same matter as had been investigated by a previous grand jury, which had returned an indictment against him which was still pending. He further stated (R. 6) that as the Alliance was not a corporation, to compel him, then under indictment, to produce the documents in his possession in response to the subpoena "would be to disregard his constitutional rights, privileges and immunities, to compel him to produce evidence against himself, in violation of Amendment V to the Constitution and to submit to an unlawful search and seizure in violation of Amendment IV to the Constitution in that said subpoena fails to show that the documents described therein are important or material, that said subpoena is a blanket command * * * and that said subpoena is not a bona fide attempt to obtain evidence * * *, but is and constitutes a fishing expedition * * * undertaken in the hope that evidence may be discovered which can be used against him, the said

Brown, on his trial under the said indictment or under a new indictment." No claim of constitutional privilege was made before the grand jury, and it was first made before the court in the contempt proceeding.

The court thereupon made an order reciting that no sufficient excuse had been presented for failure to produce before the grand jury the documentary evidence called for, and directing

> said Arthur C. Brown forthwith to appear before said grand jury in obedience to said subpoena and there produce the evidence called for in said subpoena and mentioned in said presentment, whether or not said grand jury sees fit to administer an oath. (R. 7.)

There are provisions of law which grant immunity from prosecution under antitrust laws, on account of any matter concerning which he may produce evidence, "to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." (Act of February 25, 1903, c. 755, 32 Stat. 854, 904, as amended by the Act of June 30, 1906, c. 3920, 34 Stat. 798.) The production of the documents without being sworn would have left the plaintiff in error without immunity.

After the order was entered requiring him to appear before the grand jury and produce the documents without being sworn Brown went again before the grand jury (R. 7) and again refused to

produce the documents. What occurred before the grand jury the second time is only disclosed in the second presentment for contempt, which states that he again failed and refused to comply with the requirements of the subpoena unless "subpoenaed and sworn." Being brought before the court again, judgment was entered adjudging him in contempt and directing that he be imprisoned for "and during the period of thirty days, or until he complies with the requirements of said subpoena."

He obtained stay of execution and sued out a writ of error from the Circuit Court of Appeals. His assignments of error (R. 11) are very general, and state merely that the District Court erred in finding that he had no excuse for refusal to produce the documents, and erred in adjudging him guilty and ordering him imprisoned. No reference is made in the assignments to the Constitution, and they amount to nothing more than a general statement that the court erred in adjudging him in contempt of court and ordering him imprisoned.

We construe the judgment as intended to be punitive rather than merely coercive, and as imposing on Brown punishment by imprisonment for thirty days, with the opportunity, which he might lose if he did not avail himself of it before adjournment of the grand jury, of shortening the term by producing the papers. So construing the judgment, the case has not become moot by adjournment of the grand jury. If the judgment be treated as coercive, and be construed merely to require the

imprisonment of the witness until he should testify, but not exceeding thirty days, then this case became moot by adjournment of the grand jury, as it is settled that if a contumacious witness is ordered confined until he testifies, he may not be held in custody after the tribunal before which he is required to testify has adjourned.

SUMMARY OF ARGUMENT

I. A *subpoena duces tecum* directed at a voluntary association is valid. Such an association is susceptible of being sued, and having process served on it. The secretary and custodian of its records had no right to refuse their production merely because the subpoena was not directed at him personally. This point is not really in the case, because, before Brown was adjudged guilty of contempt, he was ordered by the court which issued the subpoena to appear before the grand jury and produce the documents, and this was equivalent to the issue of a written subpoena directed at him.

II. There was not an unreasonable search and seizure in the sense that the subpoena was too broad and too indefinite or involved a general search or fishing expedition in the books and papers of the Association. The grand jury was investigating violation of the antitrust laws, the subpoena was limited to papers and documents written within a reasonable period and described them with reasonable certainty, and it sufficiently appeared from

their description that they related to the matter under investigation.

III. Assuming that the plaintiff in error properly claimed his constitutional privilege against giving incriminating evidence by the steps he took before the grand jury and in the District Court, and that the point is sufficiently raised by his assignments of error, the question then arises whether an individual who is custodian of the records of a voluntary association may decline to produce them on the ground that they tend to incriminate him. An officer or agent who has custody of the records of a corporation has no right to refuse their production because they tend to incriminate him, but the reason for this rule, as disclosed in the decisions of this Court, is that the corporation receives a charter and grant of special privileges from the State and is a creature of the State, which has a visitatorial power over it. The situations of corporations and voluntary associations do not seem to be analogous in this respect, as the associations are not created by or chartered by the State, and receive no special privileges from the State unless the right to sue and be sued in the firm name be considered such, and are not subject to a visitatorial power. We are not prepared to assert, therefore, that the lack of privilege in the case of a custodian of corporate records exists always in the case of a custodian of the records of a voluntary association. If all the members of the association are corporations, the individual custodian of the association

records has no privilege, and it may well be that if some of the members of the association are corporations and have a proprietary interest in the association's records, the custodian is not privileged merely because he or some individual member of the association would be incriminated. In the present case, the burden was on this plaintiff in error to show an excuse for disobedience of the subpoena and order of the court. He failed to sustain the burden in failing to show that he was a member of the association or that the members of the association were not all corporations.

ARGUMENT

I

THE SUBPŒNA WAS NOT INVALID BECAUSE DIRECTED AT A VOLUNTARY ASSOCIATION

The principal contention of the plaintiff in error has been that a *subpœna duces tecum* directed at a voluntary association was ineffective and invalid, and that to require him to produce the association's records the subpœna should have been directed to him personally. It has been held, of course, that a *subpœna duces tecum* directed at a corporation without naming any individual is sufficient. (*Wheeler* v. *United States*, 226 U. S. 478.) The antitrust laws contemplate that unincorporated trade associations shall be treated as entities, may be served with process, and may be indicted and prosecuted. (*United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344.)

The State of Michigan, in which this association appears to have been located, has statutes providing that an action may be brought by or against an unincorporated voluntary association composed of five or more members, in the name by which it is known, and that process "against a * * * partnership, association, or unincorporated voluntary association may be served upon any officer, * * * trustee, or agent thereof." (Compiled Laws of Michigan, 1915, Vol 3, Sections (12363) and (12432).)

A *subpœna duces tecum* directed at a voluntary association, served upon the secretary, who is custodian of the papers, should be considered sufficient, but the point is not presented by this record. Before the plaintiff in error was adjudged guilty of contempt he was brought before the court which had issued the subpœna, and the court, by written order, then and there directed him personally to go before the grand jury and produce the records described in the *subpœna duces tecum*. This was the equivalent of a *subpœna duces tecum* directed at him. He was not adjudged in contempt until he had disobeyed the order, and that disobedience, not excused, formed a sufficient basis for contempt proceedings, and, if the original subpœna were defective in not naming him personally, the defect was thus remedied.

II

THERE WAS NOT AN UNREASONABLE SEARCH AND SEIZURE IN THE SENSE THAT THE SUBPŒNA WAS TOO BROAD OR TOO INDEFINITE

One of the objections of the plaintiff in error to the validity of the subpœna is that it caused an unreasonable search in that it called for too many papers, not specifically described, and not shown to be related to the matter under investigation. None of these objections are well founded. The grand jury was engaged in an investigation of alleged violations of the antitrust laws by the furniture manufacturers. The letters and telegrams called for were limited to those sent between January 1, 1922, and June 15, 1925, and the matters to which they related were specifically set forth in the subpœna (R. 2), and included such matters as meetings of the Alliance, costs of manufacture, exchanging price lists, maintaining prices, cost bulletins, and margins of profit. The specific description of the subject matter of the correspondence called for shows that the documents were material to the matter under investigation.

The case is not like *Hale* v. *Henkel*, 201 U. S. 43, chiefly relied upon by the plaintiff in error. The description of the papers called for in the *Hale* case was very indefinite and without specification as to subject matter, and called generally for the books and papers of a corporation actively engaged in commerce in such a way that their production would have interrupted the corporation's business.

In *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, where a notice to produce had been issued by a grand jury directed to the corporation calling for the books and papers concerning any dealings or business between the parties named between January 1, 1904, and October, 1906, this Court said (p. 554):

> But unless it can be said that the court or grand jury never has any right to call for all the books and papers, or correspondence, between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded. We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have. The notice is not nearly so sweeping in its reach as in the case of *Hale* v. *Henkel*, *supra*.

See also *Wilson* v. *United States*, 221 U. S. 361.

III

PLAINTIFF IN ERROR FAILED TO SUSTAIN THE BURDEN OF SHOWING JUSTIFICATION FOR REFUSAL TO PRODUCE BY FAILING TO SHOW THAT HE WAS A MEMBER OF THE ASSOCIATION AND THAT ITS MEMBERS WERE NOT CORPORATIONS

It has been held that an officer of a corporation or other person having custody of a corporation's records may not refuse to produce them on the ground that to do so would incriminate him, and the question here is whether there is analogy between a voluntary association and a corporation which brings the same rule into operation and requires the custodian of an association's records to produce them, notwithstanding their production and his vouching for them by production, may incriminate him. To ascertain whether the rule in the case of a corporation's records is applicable to the records of voluntary associations, it is necessary to inquire into the reasons advanced for the rule that a corporation's records must be produced in such cases. An examination of the decisions of this Court shows that the rule which has been announced in respect of production by the custodian of the records of a corporation is grounded on the facts that a corporation is created and chartered by the State and receives a grant of corporate privileges and franchises from the State, and there is a reservation of visitatorial power which allows the State at all times to examine the corporation's records, to inquire whether it is violating its charter or the

law. In this respect corporate records are like public records, the custodian of which may not refuse to produce them because of the Fifth Amendment.

In *Wilson* v. *United States*, 221 U. S. 361, the individual custodian of corporate records was required to produce them, notwithstanding the production would incriminate him, for the reason that the corporation had no privilege and its records were open to inspection by the State, whose right could not be defeated by entrusting the possession of the records to an individual. It was stated that the visitatorial power may be availed of by the National Government where the corporate activities are in a domain subject to the powers of Congress. The Court quoted from *Hale* v. *Henkel*, *supra*, as follows (p. 383):

> "Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his consitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to di-

vulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty

> inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

See also *Essgee Co.* v. *United States*, 262 U. S. 151; *Grant* v. *United States*, 227 U. S. 74; *Wheeler* v. *United States*, 226 U. S. 478.

It does not appear that any reason heretofore assigned by this Court for the rule applicable to records of a corporation exists in the case of a voluntary association or copartnership.

The state of the record in this case may be such that further discussion of this subject is unnecessary. In the statement, attention has been called to the fact that plaintiff in error never has stated that the documents called for would tend to incriminate him. He expressly refused to make such an assertion or to claim any constitutional privilege

before the grand jury. His emphasis has been on the fact that the subpoena did not name him personally and that such a writ directed to a voluntary association was void and ineffective. His assignments of error contain no reference to the constitutional question. We mention these things not to claim that the question of privilege is not properly before the Court, but to emphasize the loose way the point has been dealt with. Passing all this, his case fails because he did not show that he was a member of the association or had any proprietary interest in the documents, or that any of its members were partnerships or individuals entitled to assert the constitutional privilege. For all that the record shows, all of the members of this association were corporations. It is unlikely that all of them were individuals. If the individual custodian of books and papers owned by a corporation may not refuse to produce them on the ground that they would incriminate him, certainly the custodian of the records of a voluntary association, all of whose members are corporations, may not successfully assert the privilege. If all the members of an association are corporations, the association's records should be held to have the same status as corporate records, and to be subject to examination by the public authorities, under the rules laid down in *Hale* v. *Henkel*, *supra*, and other cases. It may also be urged with reason that if some of the

proprietors or members of the association are corporations, the records of the association are not privileged as to them merely because their production would incriminate the custodian or some individual member of the association. In the cases above cited it has been held that failure to produce books and papers owned by a corporation may not be excused because the production would incriminate the individual custodian. If corporations are members of a voluntary association, they have a proprietary interest in its records, which relate to the transactions of the corporations, and are subject to visitatorial examination by the State, and that right may be insisted on notwithstanding individual members of the association as well as custodians of the records may be incriminated. If individuals become associated with corporations in that way they assume the risk of having the custodian of the records required to produce them. But it may be that in this case it is not necessary to go beyond the proposition that the custodian may not maintain the privilege if all the members of the association are corporations. The plaintiff in error disobeyed the subpoena and the order of the court. We think the burden was shifted to him to present a valid excuse, and he failed to sustain the burden when he failed to show that the papers called for did not belong to corporations. The character of the members of the association was a matter peculiarly within his knowledge. If the burden was

on the United States to negative the existence of facts from which the privilege would arise, then the judgment can not be sustained.

Respectfully submitted,

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